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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

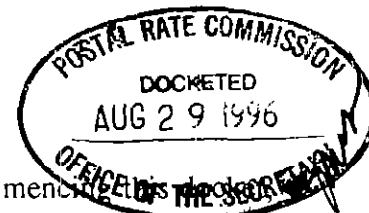
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SPECIAL SERVICES FEES AND CLASSIFICATIONS, 1996)

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY
Docket No. MC96-3

NASHUA PHOTO INC. AND MYSTIC COLOR LAB
OPPOSITION TO UNITED STATES POSTAL SERVICE
MOTION TO RECONSIDER AND ALL PENDING DISCOVERY MOTIONS, AND
NASHUA/MYSTIC MOTION TO COMPEL
(August 29, 1996)

Course of Proceedings



On June 12, 1996, the Commission issued Order No. 1115 commencing the proceedings and on June 26, 1996, Nashua Photo Inc. and Mystic Color Lab timely filed notices of intervention as full intervenors. On July 9, 1996, in their Statement of Issues, Nashua/Mystic identified as an issue to be raised the matter of bulk, non-automatable, business reply mail, and at the Prehearing Conference on July 12, 1996, Nashua/Mystic announced their intention to file a motion to enlarge the docket to consider a proposal for bulk, non-automatable, business reply mail.

On July 15, 1996, Nashua/Mystic filed their Motion to Enlarge the Scope of Proceedings for Consideration of Classification Modification with Respect to Business Reply Mail. In response to the Presiding Officer's request, the Postal Service filed its Statement on Plans for Business Reply Mail Reform on July 19, 1996. The Postal Service Opposition to the Nashua/Mystic motion was filed on July 24, 1996, and a Response to the Nashua/Mystic motion was filed by the OCA on July 25, 1996.

On August 8, 1996, the Presiding Officer certified the issue to the full Commission (Ruling No. MC96-3/4), and on the same day the Commission accepted certification and

issued Order No. 1129 granting the motion of Nashua/Mystic and enlarging the docket as requested.

Subsequent to the Commission's ruling, Nashua/Mystic prepared and filed three sets of interrogatories and requests for production of documents: the first set, NM/USPS 1-27, was filed on August 8, 1996; the second set, NM/USPS 28-36, was filed on August 12, 1996; and the third set, NM/USPS 37-65, was filed on August 13, 1996.¹ To date, the Postal Service has failed to provide a response to any of Nashua/Mystic's discovery.

Rather than respond to any of Nashua/Mystic's discovery requests, the Postal Service has taken a number of steps to avoid the Commission's ruling. To date, in addition to its original pleading opposing the Nashua/Mystic motion, it has filed a total of five motions and other pleadings seeking to undo, and possibly to thwart through delay, the Commission's Order No. 1129. Specifically, after opposing Nashua/Mystic's motion — unsuccessfully — the Postal Service first filed a motion to reconsider, followed by a motion seeking to avoid responding to certain of Nashua/Mystic's first set of interrogatories:

- (1) Motion of the United States Postal Service for Reconsideration of PRC Order No. 1129 or, in the Alternative, for Severance of Consideration of the Nashua/Mystic Proposal in a Separate Proceeding (August 16, 1996) (hereinafter August 16 Motion); and
- (2) Motion of the United States Postal Service for Relief from Obligation to Respond to Interrogatories from Nashua/Mystic (NM/USPS 8-27) Pending Resolution of Motion for Reconsideration of PRC Order 1129 and, in the Alternative,

¹ The third set of interrogatories was filed one day out of time, which was agreed to by the Postal Service, and subsequently approved by the Presiding Officer, Ruling No. MC96-3/6 (August 19, 1996).

Objections to Nashua/Mystic Interrogatories (August 19, 1996)
(hereinafter August 19 Motion).

After reviewing these two motions, the Commission issued Order No. 1131, its Order Concerning Postal Service Motions for Relief from Order No. 1129 (August 20, 1996). In that Order, the Commission ruled, (p. 3) that the "Postal Service's motions to reconsider and to suspend discovery fall short of the showing allowed for in Order No. 1129." In an effort to attempt to justify its request for deferral of the Nashua/Mystic proposal and to meet the standard for such deferral set by the Commission, and as permitted by the Commission, the Postal Service filed the following supplemental document:

- (3) Response of the United States Postal Service to PRC Order No. 1131 (August 23, 1996) (hereinafter August 23 Response).

In addition, the Postal Service filed two further papers, bringing the total to five, all without responding to a single interrogatory:

- (4) Motion of the United States Postal Service for Extension of Time to Respond to Interrogatories from Nashua/Mystic (NM/USPS-1-7) (August 22, 1996) (hereinafter August 22 Motion); and
- (5) Motion of the United States Postal Service for Relief from Obligation to Respond to Interrogatories from Nashua/Mystic (NM/USPS-37-65) Pending Resolution of Motion for Reconsideration of PRC Order 1129 and, in the Alternative, Objections to Nashua/Mystic Interrogatories (August 23, 1996) (hereinafter August 23 Motion).

The Commission established August 29, 1996, as the deadline for Nashua/Mystic to file responses to the Postal Service's initial motions for relief from Order No. 1129, as well as its supplemental pleading of August 23, 1996. In an effort to obtain an expeditious and final resolution of these several Postal Service requests for delay, Nashua/Mystic will

respond in this single document to all of the pending Postal Service motions and pleadings regarding this Commission's Order No. 1129, enlarging this docket to consider a proposed modification with respect to Business Reply Mail. In addition, for the reasons stated below, Nashua/Mystic move herein to compel the Postal Service to respond to all Nashua/Mystic interrogatories and document requests propounded in this proceeding.

Postal Service Objections to Discovery

Postal Service's August 19 Motion

In its August 19 Motion, the Postal Service purported to file objections to NM/USPS Interrogatories 8 through 27. These objections will be discussed in the same order and categories as the Postal Service's motion.

1. Objections without any stated reasons

The Postal Service stated no grounds whatsoever for its objections to seven of these 19 interrogatories: nos. 8, 9 10, 20, 23, 24 and 25. Without having articulated any reason for its objections, the objections cannot be considered to have been appropriately made; they should be denied forthwith, and responses should be ordered to be filed immediately.

2. Interrogatories referring to Mallonee/Pham Rebuttal Testimony

The Postal Service objected to Interrogatories 11-19, 21, and 22 for the reason that they refer to the Postal Service's Rebuttal Testimony in Docket No. R94-1 which was stricken in that docket. The Postal Service's position appears to be that the sworn testimony of its witnesses in a prior docket should be off limits in any subsequent proceeding because

they "were proffered in the context of the unique circumstances of that proceeding." (p. 3.)

This "uniqueness" argument is not persuasive.

Nashua/Mystic are attempting to obtain such data and information as the Postal Service has that are relevant to their proposal for bulk non-automatable, non-barcode business reply mail. The last occasion on which the Postal Service offered testimony regarding Business Reply Mail was Docket No. R94-1, through the testimony of witnesses Mallonee and Pham. It is true that these two pieces of testimony were stricken, but not because they were challenged and found to be unreliable. They were stricken because the Postal Service had violated Commission rules in failing to present its case-in-chief at the outset, and the Postal Service was determined to abuse its right to file rebuttal testimony by attempting to "slip" into the record testimony that did not rebut any other testimony in the docket. This testimony obviously is important to any intervenor attempting to learn more about Business Reply Mail, and the Postal Service has not advanced a single valid reason why it should not respond to questions about the facts discussed in that testimony.²

In any event, all of the interrogatories complained of (except perhaps for no. 19) could have been asked without reference to the rebuttal testimony. For example, NM/USPS-

² It is interesting that the Postal Service refers to the "spirit" of Commission rules which "generally do not allow discovery on rebuttal testimony" to justify its failure to respond to questions that mention the Mallonee/Pham testimony. Of course, the primary reason that Nashua/Mystic want all available information in the Postal Service's possession relevant to their proposal is for the purpose of fashioning their own proposal. Nevertheless, Nashua/Mystic also seek to have their interrogatories responded to fully, particularly to obtain a response on the record where requested information truly is not in the Postal Service's possession. The reason is obvious. Nashua/Mystic do not want to see the Postal Service later in the docket, in rebuttal testimony, sponsor testimony based on information which is now unavailable to Nashua/Mystic. This need is even greater due to those very limitations on discovery during the rebuttal testimony phase of this docket cited by the Postal Service.

14a asks "How many customers dropped out of the BRMAS program in base year 1995?" and all other subparts of the interrogatory are similar. The reference to witness Mallonee's testimony provides a context for each question, but is not an essential component of the question. Assuming, arguendo, the Postal Service's argument (that Nashua/Mystic's references to these two pieces of rebuttal testimony are inappropriate) had any substance, there still would be no reason why these interrogatories seeking factual information cannot and should not be answered.

3. History and Structure of BRM

The Postal Service objects to questions about the history and structure of the Postal Service's management of BRM (12 and 21). Insofar as the Postal Service once found it proper and relevant to sponsor testimony with respect to the details of the management of the BRMAS program, it is difficult to take seriously any objections to interrogatories which seek to obtain current factual information of the identical type once offered in evidence by the Postal Service.

The references to the prior testimony of witnesses Mallonee and Pham are only incidental. If the BRMAS program has been discontinued, or if it is no longer managed or coordinated at any level above that of individual mail processing facilities (*i.e.*, no managerial-level employee at Postal Service headquarters or regional offices is charged with direct oversight responsibility for the BRMAS program), the Postal Service only has only to so state in appropriate interrogatory responses.

4. BRMAS information

The Postal Service objects to questions which seek updates to data offered in the Mallonee testimony (14(a), (c) through (e)). Again, since only updates to previously offered evidence by the Postal Service are being sought, such objections are most curious. The Nashua/Mystic proposal will endeavor to draw a parallel between the BRMAS program being offered by the Postal Service for bulk automatable barcoded mail, and the Nashua/Mystic proposal for bulk nonautomatable nonbarcoded mail. Nashua/Mystic would like to discover the relevant facts concerning the BRMAS product so that it can structure its somewhat parallel proposal based on a complete understanding of the BRMAS product.

Nashua/Mystic do not expect the Postal Service to undertake an extensive data gathering effort on its behalf. If the Postal Service does not have readily available either data or knowledgeable personnel who can respond to the question posed, it need only so state, with the added caveat that, should the Postal Service be in the process of gathering such information, it should indicate when the information is likely to become available.

5. Bulk Requirements

The Postal Service objects to interrogatory 19(c), which asks why the DMM does not require a minimum volume of incoming BRM mail in order to qualify for the BRMAS rate. So that Nashua/Mystic can fashion their proposal, they quite naturally seek information from the Postal Service as to minimum volume issues.

If the Postal Service has never given any thought to the possibility of considering a minimum volume, or if it has considered the possibility but has not perceived any need to

require a minimum volume, or if it has any other operational or marketing basis for not requiring a minimum volume, the response need only articulate such explanation.³

6. Non-Existent Information

The Postal Service objection states that it has no "operational surveys and cost studies" that would produce the information requested (22(b) and 26). If this is so, that is the proper response to the interrogatory. The non-existence of information requested is not the basis for an objection to an interrogatory. Indeed, if the Postal Service's assertion is true, Nashua/Mystic seek to have the record reflect the nonexistence of this information so that this information will not be learned of for the first time in the Postal Service's rebuttal testimony.

Postal Service's August 22 Motion

In its August 22 Motion, the Postal Service sought to delay responses to interrogatories 1 through 7, interrogatories to which no objections were filed. These interrogatories were filed and served by hand delivery on August 8, 1997. By the Commission's rules, responses were due on or before August 22, 1997. The Postal Service seeks a 15-day extension until Friday, September 6, 1996, to respond to just these seven interrogatories, for several reasons, including "juggling other non-Docket No. MC96-3

³ The Postal Service Motion states that "[t]o complicate matters, the authors [Mallonee and Pham] of the proffered testimony no longer have responsibilities relevant to Business Reply Mail, having moved on to assume other important responsibilities." Nashua/Mystic are aware that the Postal Service from time to time has undergone certain organizational adjustments. If no one has assumed the responsibilities for BRM previously assigned to Messrs. Mallonee and Pham, or if the BRMAS Program is no longer the responsibility of any managerial-level employee, the Postal Service need only so state.

responsibilities and obligations." (p. 2.) The requested extension would give the Postal Service 29 days to answer seven interrogatories, or approximately one response for every four days.

Insofar as the Postal Service has objected to or failed to answer all of Nashua/Mystic's other interrogatories, it is inconceivable that the Postal Service does not have the resources to answer just seven straightforward, non-objectionable interrogatories. The Postal Service seems to say that it has set priorities for its employees so that compliance with Commission discovery deadlines was established as each employee's last priority. If the Commission's rules are to have any meaning in these proceedings, immediate responses to these interrogatories by the Postal Service should be ordered.

Postal Service's August 23 Motion

In its August 23 Motion, the Postal Service sought to avoid responding to interrogatories 37-65, the entire the third set of Nashua/Mystic interrogatories, due to the pendency of the Postal Service's Motion to Reconsider.

This third set of interrogatories deal exclusively with the "Prepaid Courtesy Reply Mail experiment," under which the Postal Service may have entered into an experiment with one or more mailers of great relevance to the Nashua/Mystic proposal. Published reports state that the Postal Service has waived collection of any BRMAS fee for one or more mailers who apparently perform less work-sharing than Nashua/Mystic. If true, this would be an experiment with an alternative low cost means to process incoming bulk BRM which is

highly relevant to the Nashua/Mystic proposal. Clearly, the Postal Service's objections to these interrogatories are invalid.

Beyond its general objection, the Postal Service objects to three of these interrogatories.

1. Legal Authority

On its face, it appears unusual for the Postal Service to object to stating the legal authority for its own actions in carrying on any experiment. (45 and 49(c).)

Nevertheless, question 49(c) presumes that the Prepaid Courtesy Reply Mail experiment was approved at some level of authority within the Postal Service, and it asks at what level (the question pointedly does not ask who approved it). The question should be interpreted to mean the level of authority in terms of the Postal Service's organizational structure in existence at the time the experimental program was approved. If the experiment was approved by some committee (as opposed to an individual), the Postal Service need only identify that committee. Question 49(c) did not intend to ask for an opinion as to the legal authority for conducting the experiment.

2. Presentations to the Board of Governors

Nashua/Mystic do not request any pre-decisional management opinions or recommendations, and appreciate the Postal Service's admission that requests for factual information in charts and exhibits are proper and not objected to.

3. Prepaid Courtesy Reply Mail

Nashua/Mystic cannot understand why the Postal Service is reluctant to state whether Prepaid Courtesy Reply Mail is considered to be a special service, similar to BRM and the

other special services at issue in this docket. This inquiry cannot be characterized properly as calling for a legal conclusion.

Second Set of Nashua/Mystic Interrogatories

The Postal Service has not responded to, objected to, or sought relief from responding to Nashua/Mystic's second set of interrogatories. This set (NM/USPS 28-36) was filed and served by hand-delivery to the Postal Service on August 12, 1996. Responses were due on Monday, August 26. The date for filing these interrogatories having passed, and the Postal Service's failure to object or to seek an extension of time having expired, responses should be ordered to be filed forthwith.

Nashua/Mystic Motion to Compel

For the reasons set out above, Nashua/Mystic respectfully move to compel responses to their interrogatories for the Postal Service, none of which have been responded to, be they objected to by the Postal Service with stated reasons, objected to by the Postal Service without any stated reasons, wholly ignored by the Postal Service, or be they the subject of various dilatory motions filed by the Postal Service. The basis for this motion has already been stated above with respect to all of the interrogatories at issue.

The Postal Service's Case for Rejection or Delay

Postal Service's August 16 Motion for Reconsideration

The Postal Service's August 16 Motion for Reconsideration advanced certain arguments requesting the Commission to reverse its position and refuse to consider the Nashua/Mystic proposal at all. If the Postal Service's request were granted, Nashua/Mystic would be assured of no hearing whatsoever on the merits of their proposal, now or in the future until the Postal Service either filed a separate BRM reclassification case, or the next omnibus rate case, or the Postal Service "formally declares" its intention to file a BRM reclassification case.⁴ The Postal Service has made it very clear that management is not committing to recommend to the Governors the filing of a case to deal with the problem posed by Nashua/Mystic (p. 7, fn. 6). Further, it is clear that no representation has been made as to what the Governors would or might do if such a proposal were to be submitted to them. (*Id.*) It is unknown if the Postal Service has ever "formally declared" that it would not do something. Therefore, the Postal Service's principal request continues to be that the Commission simply deny Nashua/Mystic a hearing on their proposal for the foreseeable future. Clearly, this should be deemed unacceptable.

In the alternative, the Postal Services asks the proposal be put into a "separate classification proceeding for consideration of that BRM proposal." (p. 1.) This is a curious statement, as the Postal Service has indicated in other places an apparent desire to await the

⁴ The Postal Service and the Governors have assiduously resisted adding classification issues to omnibus rate proceedings.

results of, and possibly have the Nashua/Mystic proposal rolled into, an omnibus solution to BRM/BRMAS redesign.

In Order No. 1131, the Commission, *sua sponte*, ruled that the Postal Service's showing was inadequate, and provided the Postal Service the opportunity to make a supplemental filing. Before dealing with that supplemental filing, comments on the Postal Service's arguments in its August 16 Motion for Reconsideration are in order.

In its August 16 motion, after noting the Commission's Order (No. 1129) granting the Nashua/Mystic motion to enlarge this proceeding, the Postal Service referred to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Mail Order Ass'n of America v. United States Postal Service*, 2 F.3d 408 (D.C. Cir. 1993), ("the MOAA decision") as support for its argument that the Commission should reverse itself and not enlarge this proceeding to consider the Nashua/Mystic proposal.

Several important responses are in order. First, the Postal Service argument — which is essentially an attack on the Commission's jurisdiction — is inappropriate here. It merely restates what the Postal Service argued "the first time around," when it objected to the Nashua/Mystic motion, unsuccessfully. Second, the Postal Service argument is not well founded. The MOAA decision concerned a ratemaking case. This docket is a classification case, and the Commission's jurisdiction to consider intervenor classification proposals is clear. Third, a reading of the MOAA decision — vis-a-vis the issue now before the Commission — would support Nashua/Mystic's position, not that of the Postal Service. In the MOAA decision, the D.C. Circuit expressly noted the jurisdictional authority of the Commission to assess the fairness and equity of the proposals before it. *See MOAA*, 2 F.3d

at 423-24. And finally, the Postal Service's entire argument on this point — that the Commission's authority "to turn a Postal Service request into something it was never intended to be" (p. 3.), particularly "when pursuit of an extraneous proposal...has the potential to interfere with the formulations of postal policy" (p. 3.) — is not only a rehash of its original objection to the Nashua/Mystic motion, but is based upon unsupported facts. The Commission did not willy-nilly grant the Nashua/Mystic motion. It did so only after careful consideration of the Postal Service objections. A primary reason not to subscribe to the Postal Service's position was its failure to advance anything but bald argument and empty rhetoric. In short, the Postal Service simply did not make the showing required to forestall consideration of the Nashua/Mystic proposal in this case.

The Postal Service motion then goes on to argue that the MOAA decision has somehow limited the Commission's statutory authority to consider classification proposals. (*See* August 16 Motion, pp. 4-5.) Respectfully, it did not. Although much more could be written in rebuttal to the Postal Service's reasoning regarding the MOAA decision, the critical point of the MOAA decision, for purposes of the present dispute, is that the Commission's decision on such issues should be based on record evidence, which is in accord with Nashua/Mystic's position in this case. *See MOAA*, 2 F.3d at 424-25. In this case, the **Postal Service has utterly failed to make the required showing** as to why the Nashua/Mystic proposal should not be considered in this proceeding. And the Postal Service has purported several times to try to make that showing. Any criticism of the Commission, which makes its decisions based upon the record and the law, and which has given the Postal Service several opportunities to try to make the required showing, surely is misdirected.

The Postal Service appears to be worried that, if the Nashua/Mystic proposal is permitted a fair hearing on the merits, the floodgates will open to an "unlimited number of special services issues" and an "infinite variety of classification changes." (p. 4.)

Nonetheless, the Postal Service has not identified a single such issue or change, and none has come forth, despite the Commission's publication of a Comprehensive Notice in the *Federal Register* two weeks ago, on August 15, 1996.

The Postal Service also raises the specter that consideration of the Nashua/Mystic BRM matter to litigation status could well require other parties to intervene in this proceeding. The Postal Service expresses grave concern for its "other BRM customers who must now choose whether to become litigants in Docket No. MC96-3." (p. 8) The Postal Service is worried that these mailers will need to "incur expenses associated with 'being heard' in litigation which far exceeded those associated with participation in informal dialogue with postal management." (*Id.*) Further, enlargement of this docket "could well require parties who have otherwise chosen not to intervene in this proceeding to do so now in order to protect interests they have had no reason to expect could be at stake." (*Id.*) Since the Commission issued its Order No. 1129 on August 8, not one motion for intervention has been received with respect to BRM or any other issue in this docket. If there were such a throng of BRM customers who were in favor of the Postal Service's gross overcharging of non-automatable non-barcoded BRM, the only BRM issue that is being raised in this docket, one would have expected them to have already come forward to intervene. Nashua/Mystic have disavowed any intention to seek a sweeping re-examination

of BRM/BRMAS rates, attempting rather to achieve a cure of a single serious defect in the DMCS.

In this case, the Commission has found a "prima facie case that its BRM fees are inequitable, and that its case should be heard in this docket, unless there were strong countervailing interests that would be served by delay." (Order No. 1131, p. 2.) It is submitted that whenever mailers can convince the Commission that a "prima facie case" exists of inequitable rates, which appear to violate 39 U.S.C. sections 403(c), 3622, and 3623, the Commission should provide the mailer a hearing on a corrective proposal. This type of proposal has been reasonably infrequent before the Commission, and the Postal Service's speculative conjectures should not be allowed to rule the day.

If the Postal Service truly fears that the limited issue raised by Nashua/Mystic will somehow escalate into an expensive, wide-ranging omnibus hearing on BRM/BRMAS, it has an immediate option available. Namely, under the new rules promulgated recently in Docket No. RM95-4, the Postal Service could file a request for an expedited hearing limited to seeking Commission approval of the Nashua/Mystic proposal. Filing of such a request would probably be non-controversial, and could be completed well before the completion of this docket. For reasons of its own choosing, however, the Postal Service has rejected this option.

Nashua/Mystic allege that the current mail classification results in charging rates that are inequitable and discriminatory. Despite the scores of pages of Postal Service argument filed in this docket, the Postal Service has not devoted one word to responding on the merits to this basic issue. By ignoring the merits of the Nashua/Mystic assertion, the Postal Service

may be admitting that it has no plausible argument to assert to justify charging mailers such as Nashua/Mystic ten cents per piece when the Postal Service performs virtually no work. It is no answer to claim "managerial prerogatives" in the face of an allegation of inequitable and discriminatory rates. The Postal Service does not have the "managerial prerogative" to allow inequitable and discriminatory rates to be charged, even if, as the recipient of these hundreds of thousands of dollars in unjustified fees, it benefits from continuation of the status quo.

Rather than deferring to the Commission's Order, the Postal Service asks the Commission to defer "to management's need to thoroughly review the operational and financial aspects of various reforms...." (p. 6.) Had the Postal Service been serious about reform of Business Reply Mail, it would have begun no later than at the conclusion of Docket No. R94-1 (where the Commission's Opinion and Recommended Decision was issued on November 30, 1994) to have an exchange of ideas with mailers (if desired) and to craft a reclassification case, using the Pham and Mallonee testimony as the beginning point, rather than now, in August 1996. The Postal Service knew it had a substantial problem with the entire BRM program even before Docket No. R94-1 concluded.

The Postal Service asks the Commission, if "deferral of Commission action depends upon a commitment to future action by the Postal Service," to consider the "commitment reflected in its July 19, 1996 Statement of Plans for Business Reply Mail Reform." (p. 7.) A plain reading of that Statement reflects no commitment to anything, and at best an expectation for some unspecified "appropriate action," as the Statement concludes with the

language "we would expect results that will enable us to take appropriate action around the end of this year."

The Postal Service's concern with possible delay of consideration of the other proposals in this Docket rings hollow. On August 8, the Commission issued Order No. 1129 enlarging the docket. Rather than deferring to the Commission's ruling and responding to the interrogatories submitted by Nashua/Mystic, the Postal Service has chosen to engage in extensive dilatory motions practice. If the Postal Service had devoted to responding to discovery the same effort that it put into filing five dilatory pleadings, all interrogatories would have been responded to by their last due date, August 27, 1996. Now, having done its best to thwart the Commission's ruling, to ignore the rules of discovery, and to delay this docket to the utmost, in a classic "blame the victim routine," the Postal Service points the finger at Nashua/Mystic, and at the Commission, and sets itself up as guardian of the reclassification timetable. The only source of delay in these proceedings is found with the approach employed by the Postal Service.⁵

Postal Service August 23 Response to PRC Order No. 1131

The Postal Service's Response to PRC Order No. 1131 attempts to make up for its failure to articulate any acceptable reasons for delay in its prior two motions. This latest attempt is no more successful than the earlier attempts to justify delaying consideration of the Nashua/Mystic proposal.

⁵ In order to establish responsibility and accountability for the special services reclassification timetable where it belongs, the commission may want to consider postponing the date for filing of intervenor's case-in-chief until a reasonable number of days after the Postal Service responds to interrogatories filed by Nashua/Mystic.

First, the Postal Service's pleading fails to meet the standard set in the Commission's Order, even as the Postal Service itself reads that Order. For example, the Postal Service Response says "[t]he Order also directs the Postal Service to include the beginning and scheduled ending date of the Postal Service's current investigation...." (p. 1.) By way of response, the Postal Service sets the beginning date as "[e]arlier this year." No date is stated for the formation of the "cross-function task force to review [every aspect of] Business Reply Mail, and if necessary, to propose the re-engineering of the Business Reply Mail product line." (p. 2.) The Postal Service has every reason to be a bit vague on these responses, for it appears that the so-called "cross-functional task force" is a recent phenomenon. The working group, alluded to subsequently, is newer still.

For over a year, Nashua and Mystic have each attempted to persuade the Postal Service to investigate their respective claims that the BRM rates being charged to them are unfair and unjust. Nashua and Mystic informally learned of the formation of a task force in May. The first that these companies were told of the "working group" was at a meeting held in Parkersburg, West Virginia on July 11, 1996. Nashua and Mystic understood that the working group was being established then to deal with their complaints. At that time, the Postal Service knew that Nashua and Mystic had intervened in Docket No. MC96-3, and had filed its Statement of Issues, stating its intention to ask the Commission to examine this issue. Viewed in this way, the Commission's willingness to hear arguments concerning bulk, non-automatable, non-barcoded Business Reply Mail is anything but interference with an ongoing Postal Service inquiry. Indeed, concern that mailers could be successful in making their own proposals to the Commission within the context of the Special Services docket may

have led directly to creation of the task force, and the anticipation of Nashua/Mystic's Motion to enlarge the proceeding may have led directly to creation of the working group.

Second, the Postal Service's pleading makes a candid admission that would appear to make it impossible for it to make the showing required to avoid consideration of the Nashua/Mystic proposal in this docket:

At this time, the Postal Service has yet to determine whether the alternatives it plans to study include any which will conform precisely to the terms of Nashua's classification proposal. [August 23 Response, p. 2, fn. 1. (emphasis added)]

The Postal Service should be complimented for its forthrightness in advising the Commission of this fact. Nevertheless, if the Postal Service has not even decided that it will study the Nashua/Mystic classification proposal, how can the Postal Service seriously ask the Commission to defer its consideration of the Nashua/Mystic proposal to await the results of the Postal Service investigation? This factor alone justifies the denial of the Postal Service's motion.

It is difficult for the Postal Service to be persuasive when stating in conclusory fashion that "[a] review of the 65 Nashua/Mystic interrogatories directed to the Postal Service suggests that a significant number of questions seek information generally of the type that **might** be developed through surveys or studies prepared by the Postal Service in anticipation of filing a Request for changes in BRM fees or classifications." (August 23 Response, at pp. 4-5, emphasis added). The Postal Service then goes on to identify 25 of the 65 Nashua/Mystic interrogatories as "seeking information which is unavailable and of the type which ordinarily would be prepared only in anticipation of Commission litigation." (p. 5.) The Postal Service is exactly right in saying that many of the Nashua/Mystic

interrogatories seek information of the type that "**might**" be developed by the Postal Service in anticipation of a classification filing, but that statement is wholly irrelevant. What the Commission had asked was whether a delay would actually result (not just as a matter of good practice should result) in additional information that would assist the Commission in evaluating the Nashua/Mystic proposal.

Third, the Commission asks for the "scheduled ending date" of the Postal Service's investigation. The Postal Service's response is that it is "unable to project a detailed timetable...." (p. 3.) The "core work," whatever that is, "will be completed as early as the end of the calendar year...." but the Postal Service does not state how late the balance of the work may be completed. (*Id.*) It should be clear, from the Postal Service's own statements, that the agenda of the task force is neither necessary nor sufficient to resolve the issue raised by Nashua/Mystic. The required showing of dates has not been made.

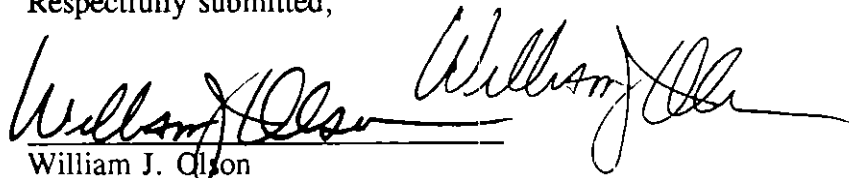
Fourth, the Postal Service says that the working group, which includes representatives of both Nashua and Mystic, met "most recently on July 26, 1996" and "was established in response to overtures made by Nashua/Mystic shortly before the filing of the Request in Docket No. MC96-3." (p. 3.) In reality, what was described as the "most recent" meeting was the only meeting involving Nashua and Mystic as of the date of the Postal Service's filing, although a second meeting did subsequently occur on August 28, 1996. Second, the Nashua/Mystic "overtures" date back at least one year. As stated above, it may be more accurate to say that the working group was established due to the danger that the Commission might consider the Nashua/Mystic proposal.

Fifth, the Postal Service attempts to demonstrate that the Nashua/Mystic interrogatories "do not appear to be limited to the scope of their proposal." The Postal Service's analysis is based on the principle that any interrogatory which does not ask questions about bulk, non-automatable, non-barcoded mail is beyond the scope of the proposal. Clearly that is not a reasonable standard to employ. Nashua/Mystic have asked interrogatories tailored to developing the type of information that they believe necessary to prepare their direct testimony, and to guard against rebuttal testimony by the Postal Service which could be anticipated to criticize the concept, costing, or rate design of the Nashua/Mystic proposal, revealing at the last minute the very information sought by these interrogatories. As stated above, if this information is unavailable, Nashua/Mystic seek to establish that fact on the record to avoid unnecessary surprises in the Postal Service's rebuttal testimony.

Conclusion

The Postal Service has not demonstrated that the "countervailing considerations" of the type sought by the Commission exist, and all of the Postal Service's pending motions with respect to Nashua/Mystic, including its motion to reconsider Order No. 1129, should be denied, and answers should be ordered to be made forthwith.

Respectfully submitted,

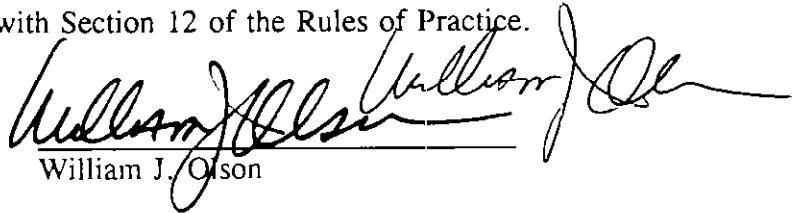


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all participants of
record in this proceeding in accordance with Section 12 of the Rules of Practice.


William J. Olson

August 29, 1996